IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.937 OF 2003

Sanjay Jagannath Ursal,
Age : 21 years, Occ : Wages,
R/o.Chaphodi, Taluka - Karvir,
District - Kolhapur. ...Appellant/
(At present in Kolhapur Central Ori.Accd.No.1
Prison, Kalamba).

Versus

The State of Maharashtra ...Respondent
(through Shivaji Bandu Chougule)
Age 50 years, Occupation - Agriculture,
R/o.Savarde-Dumala, Taluka - Karvir,
District - Kolhapur.

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Mr.Sarang Aradhaye with Mr.Abhinandan Vagyani
for Appellant/Ori.Accused No.1.

Mr.K.V.Saste, A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

AUGUST 29, 2006.

ORAL JUDGMENT :

1. This Appeal by accused No.1 takes exception to the Judgment and Order passed by the IV Ad-hoc Additional Sessions Judge, Kolhapur dated

June 30, 2003 in Sessions Case No.210 of 2002. The Appellant/accused No.1 along with Sou.Amita @ Sushila Jagannath Ursal/Accused No.2 was charge-sheeted and tried for offence punishable under Sections 363, 366-A read with Section 34 of the Indian Penal Code and Appellant/Accused No.1 was further charged for offence punishable under Section 376 of the Indian Penal Code.

2. The prosecution case has been extensively set out in Para 2 of the impugned Judgment. It is unnecessary to burden this Judgment by reproducing the same, as the sole question that has been argued before this Court in the present Appeal is that the finding of fact recorded by the Trial Court that Shubhangi Shivaji Chougule (hereinafter referred to as 'the prosecutrix') was below 16 years of age is manifestly wrong and if that finding was to be set-aside and the defence version accepted that the prosecutrix was above 16 years of age, in that case, the Appellant/accused No.1 could not be proceeded for alleged offence, as the prosecutrix was a consenting party.

3. It is relevant to note that accused No.2 has been acquitted by the Trial Court of all the charges. The Trial Court by the impugned order has convicted the Appellant/accused No.1 for offence under Section 376 of the IPC as also for offence under Section 363 and 366-A of the IPC. Insofar as conviction under Section 366-A of IPC is concerned, learned A.P.P. fairly accepts that the said provision cannot be invoked against the Appellant/accused No.1, who himself was responsible for committing rape on the minor. This is so because Section 366-A of the IPC provides for an offence against person who, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with "another person". That offence, at best, could have been proceeded against accused No.2. In the circumstances, the order of conviction and sentence imposed by the Trial Court against the Appellant/accused No.1 for offence under Section 366-A of the IPC, cannot be sustained.

4. That however, does not absolve the Appellant/accused No.1 of other charges. The Appellant/accused No.1 has been found to have induced the prosecutrix to accompany him to Pune so that the prosecutrix can participate in sports at Pune. On such promise, the prosecutrix accompanied the Appellant/accused No.1. On and from 9th April 2002, the prosecutrix remained in company of the Appellant/accused No.1 till 15th August 2002 and during this period, the Appellant/accused No.1 subjected the prosecutrix to intercourse. The Appellant/accused No.1 perhaps can succeed only if he were to persuade this Court that the prosecutrix was not a minor or below 16 years of age at the relevant time. On the other hand, as has been found by the Trial Court that the prosecution has proved in evidence that the age of prosecutrix at the relevant time was below 16 yeas, and if that finding was to be affirmed, the fact that prosecutrix consented for intercourse will be of no avail in view of the mandate of Section 375-Sixthly of the IPC.

5. Before I consider the finding reached by the Trial Court with reference to the factum of age of prosecutrix at the relevant time, I shall straight away advert to the evidence adduced by the prosecution to prove the age of the prosecutrix at the relevant time. The prosecution has produced Birth Certificate and the Register of Births and Deaths before the Trial Court. The Birth Certificate issued under the signature of Gram Sevak dated 30th May 2002 has been proved in evidence and marked as Exhibit 34. The same was proved by Nivrutti Krishna Patil (PW 8) who was serving as Gram Sevak at Village Savarde at Sadoli since last three years (from the date when he was examined). He had issued the extract of birth of the prosecutrix. He has deposed about the correctness of the contents of the said Certificate and also proved his signature occurring on the Certificate. He has deposed that the entries mentioned in the extract are taken on the basis of Births and Deaths Register. Register of Births and Deaths was produced in Court. He has also deposed that the entry recording the birth of girl being daughter of Shivaji Chougule was noted on the basis

of wardi given by the peon of Gram Panchayat. At the relevant time, in 1989, D.Y.Kamble was the Gram Sevak and the Register was maintained in ordinary course of business in his handwriting. This witness (PW 8) has been cross-examined. In the cross-examination, he has stated that it is not true that filled-in forms were submitted, on the basis of which entry was effected regarding birth of any child. He was asked as to whether he knew as to how many persons by name Shivaji Chougule and Chhaya Chougule are at Savarde, Sadoli, which question he has answered in the negative. He was then asked whether it is true that in the Register brought by him, there are number of corrections and nobody had initialled it pertaining to other entries. This question has been answered in the affirmative by the witness. However, the question was not directed with regard to the entry on the basis of which subject Birth Certificate (Exhibit 34) has been issued. In other words, there is no correction in the Register with regard to the entry on the basis of which, Birth Certificate (Exhibit 34) came to be issued. This witness has then stated that Dharma Kamble, who had given wardi

about the birth of the child, is still working as peon at Savarde. He has also stated that as per the record, it is seen that the delivery of Chhaya (mother of prosecutrix) was done by Manja Kadam and that, she was still alive. He has then stated that names of children after naming, are mentioned in the Register in respect of whom information is given. The above question were put in the cross-examination to contend that the Birth Certificate (Exhibit 34) was of no avail as it did not mention the name of the child. Besides, the person who gave wardi namely Dharma Kamble or Manja Kadam, who undertook the delivery of Chhaya were not examined. These aspects have been considered by the Trial Court and answered against the Appellant. I shall revert to that a little later.

6. Suffice it to observe that the date of birth of the child mentioned in the Birth Certificate (Exhibit 34) is 1st August 1989. If it is held that the birth certificate pertains to prosecutrix, then it necessarily follows that the prosecutrix was below 16 years of age on the date of incident on 9th April 2002. The prosecution has

also relied on School Leaving Certificate (Exhibit 69). The School Leaving Certificate, however, mentions the age of prosecutrix as born on 2nd January 1989. This date obviously is not consistent with the date mentioned in the Birth Certificate. Be that as it may, the School Leaving Certificate has been proved by Gaus Banumiya Attar (PW 17). PW 17 was working as Head Master in Madhyamik Vidyalaya, Savarde-Sadoli (Dumala). He has deposed that he has issued a Certificate in the name of Chougule Shubhangi Shivaji. He has produced the original School Register before the Trial Court. He has stated that in the year 2001-2002, Shubhangi Chougule was learning in 6th standard in the School and her name was shown at Serial No.988 in the School Register. He has deposed that the School Register mentions the birth date of Shubhangi Shivaji Chougule as 2nd January 1989. He has deposed that he has issued the School Leaving Certificate on the basis of said Register. He has identified his signature on the Certificate as also spoken about the contents of the Certificate being true and correct. In the cross-examination, he has accepted that the

prosecutrix failed in 6th standard and she left the School. He was asked whether he had brought school admission application form on the day when he was being cross-examined, to which, he has answered in the negative. He has stated that the application for admissions are available in the School record. He has then stated that the prosecutrix was taking education in IV standard in Savarde School. He has denied that he has falsely stated that birth date of the prosecutrix is 2nd January 1989. He has stated that the entry in the Register has been made by clerk Pandurang Matugade in the School Register who was still working in the School. He has denied the suggestion that the entries in the School Register in respect of the prosecutrix are false.

7. Besides this evidence, the prosecution also relies on the evidence of Shivaji Bandu Chougule (PW 11)/father of the prosecutrix. He has deposed that he had three daughters and one son. He has stated that the prosecutrix was the second daughter and her age was 13 years. The cross-examination with regard to the factum of age, was on the following lines:

> "My wife may be younger by 5 years than that of me. I was married at my age 18/19 years. After two years I gave birth to my first daughter. Thereafter after two years I gave birth to daughter Shubhangi. First delivery of my wife took place at Savarde-Dumala. I have not noted down the birth dates of my children. My elder daughter-Mangal is married."

8. Prosecution has also relied on medical evidence and the evidence of Dr.Sanjay Muralidhar Padhye (PW 6). The Trial Court has analysed the evidence on record while considering Point No.1. On analysis of the evidence on record and considering the arguments canvassed on behalf of both sides, the Trial Court proceeded to hold that the entry regarding birth appearing in the Register of Births and Deaths has been proved. The Trial Court has observed that there was no suggestion to Nivrutti Krishna Patil (PW 8) during the course of cross-examination that the said Birth Certificate was false. The Trial Court has also considered the fact that one Dharma Kamble, who had given wardi was not examined, and held that it will make no

difference. For this proposition, reliance has been placed by the Trial Court on the exposition of the Supreme Court in the case of **Harpal Singh and Anr. vs. State of Himachal Pradesh reported in AIR 1981 SC 361**. The Trial Court has accepted the prosecution case which is founded on the Birth Certificate (Exhibit 34) to hold that prosecutrix was below 16 years of age on the relevant date, as she was born on 1st August 1989. This approach of the Trial Court cannot be faulted. The view taken by the Trial Court with regard to the evidence on record is a possible view. In the latter part of the Judgment, the Trial Court has considered the argument of the Appellant that there is discrepancy in the age mentioned in the Birth Certificate (Exhibit 34) and the School Leaving Certificate (Exhibit 69). The Trial Court relied on the exposition in the case of **Sidheshwar Ganguly vs. State of West Bengal reported in AIR 1958 SC 143** to hold that Birth Certificate is conclusive evidence of the age of the prosecutrix. The Trial Court has also relied on another decision in the case of **Mohandas Suryavanshi vs. State of M.P. reported in 1999 Cri.L.J. 3451**, wherein it was held that

the entry in the Birth Register shall prevail being conclusive evidence. Relying on this established legal position, the Trial Court proceeded to hold that the discrepancy in the date of birth occurring in the two certificates namely Birth Certificate and School Leaving Certificate will be of no avail to the Appellant/accused No.1. For, the Court can rely upon the Birth Certificate/Birth Register (Exhibit 34), which evidence inspires confidence to return finding of fact on the age of the prosecutrix. This view taken by the Trial Court is unexceptionable. Once the evidence in the shape of Birth Register is to be accepted as it is, it necessarily follows that the other medical evidence cannot be the basis to doubt the prosecution case with regard to the factum of date of birth of the prosecutrix. The medical evidence or for that matter, the other ocular evidence cannot be the basis to hold that the prosecutrix was not under 16 years of age. The Trial Court has considered the relevant evidence in Paragraphs 9 to 12 of the impugned Judgement. The conclusion reached by the Trial Court that the prosecutrix was minor below 16 years of age on the relevant date is a possible

view and unexceptionable. That finding of fact will have to be upheld.

9. Counsel for the Appellant, however, relied on decision of the Division Bench of this Court in the case of **State of Maharashtra & Ors. vs. Dnyaneshwar Suresh Borkar & Ors. reported in 2006 (2) Bom.C.R.(Cri.) 6**, in particular, Para 28 of the said decision. Even on careful reading of Paragraph 28 of this decision, which is pressed into service, I fail to understand the significance of this decision to the case on hand. In fact, in the said Paragraph, the Court has referred to the decision of the Supreme Court in the case of **Vishnu @ Undrya v. State of Maharashtra reported in (2006) 1 SCC 283**, in which case, the question regarding age of prosecutrix appeared for consideration. The Court referred to the School Leaving Certificate issued by the Municipal School as well as the Birth Register maintained by the Corporation and Register of the Hospital where the prosecutrix was born on particular date. The Apex Court proceeded to discard the School Leaving Certificate which gave incorrect date and preferred

to rely on the date of birth given in the Register of Births and Deaths maintained by the Corporation as well as the Birth Register maintained by the Hospital. The Counsel for the Appellant then relied on the decision of Single Judge of this Court in the case of **Sindhu Sukhdeo Waghmare vs. State of Maharashtra reported in 2005(1) Bom.C.R. (Cri.) 354**. Reliance was placed on the observations made in Paragraph 5 of this Judgement. Even this Judgment is of no avail to the Appellant. In that case, the evidence of PW 11, who was the Head Master of the school was held to be un-trustworthy, as his statement was not recorded by the Police during the investigation nor his name was mentioned in the list of witnesses given along with the charge-sheet. On that basis, the School Leaving Certification (Exhibit 56) pressed into service by the prosecution was ignored. The observations made in Paragraph 5 of this decision are in the fact situation of that case. In the present case, there is no cross-examination of PW 8 that his statement was not recorded by the Police nor the Investigating Officers (PW 15 and PW 16) have been examined pointedly in that behalf. Be

that as it may, the fact remains that the evidence regarding the Register of Births and Deaths, which has been proved by PW 8, has remained unrebutted. The prosecution evidence establishes that the said extract in the Register of Births and Deaths pertain to the prosecutrix, which shows her date of birth as 1st August, 1989.

10. Counsel for the Appellant had also relied on the decision of this Court in the case of **Jagannath Bhika Patil vs. The State of Maharashtra reported in 1979 Bom.C.R. 664**. Reliance was placed on the exposition articulated in head note (C) of this decision. To my mind, even this decision will be of no avail to the Appellant. The medical evidence cannot be the basis to discard the Register of Births and Deaths, which has been proved and in law, is a conclusive piece of evidence. Indeed, the presumption in respect of the entries in the said Register is rebuttable. However, merely because there is some inconsistency in the age given in the opinion of the doctor decided on the basis of ossification test with that of the Birth Register, that itself cannot be the

basis to hold that the legal presumption relating to the entries in the Register of Births and Deaths stood rebutted as such. In my view, however, the decision in the case of **Jagannath Bhika Patil (supra)** goes against the Appellant. It has been observed that "if" entry regarding date of birth admittedly made in Gram Panchayat Office was produced and proved, that would have been credit worthy evidence in favour of the prosecution. That evidence was not produced by the prosecution in the said case. However, in the present case, the prosecution is relying on the Register of Births and Deaths. The said evidence has been duly proved. The Trial Court has accepted that evidence. I see no infirmity either in the approach or the conclusion reached by the Trial Court in that behalf. Accordingly, the said finding is accepted.

11. Viewed thus, it will have to be concluded that the prosecutrix was below 16 years of age on the relevant date, and on that finding, the Appellant will have to be held as guilty for offence punishable under Section 376 of the IPC.

12. The Appellant would then contend that even if the finding on the ages of the prosecutrix at the relevant time was to be upheld and Appellant held guilty of offence under Section 376 of the IPC, that however, will be of no avail to the prosecution insofar as offence under Section 363 of the IPC is concerned. It is submitted that the prosecutrix volunteered to accompany the Appellant/accused No.1. It was not a case of "taking away" prosecutrix from the custody of her lawful guardians as such or for that matter, one of "enticement" of prosecutrix. On the other hand, the learned A.P.P. has relied on the evidence which supports the prosecution case that the prosecutrix was induced by the Appellant to accompany him. Assuming that the Appellant were to succeed with regard to offence under Section 363 of the IPC, even then, that will not take the matter any further for the Appellant. This is so because the Appellant has been held guilty of offence under Section 376 of the IPC and on account of mandate of proviso to Section 376 of the IPC, the Appellant has been sentenced to suffer rigorous imprisonment

for seven years, which is the minimum sentence provided for such offence. There are no special or adequate reasons forthcoming to reduce the sentence. The Trial Court has, therefore, sentenced the Appellant for a period of seven years. No fault can be found even with that conclusion of the Trial Court.

13. Counsel for the Appellant submits that there are extenuating circumstances which this Court may consider for reducing the quantum of sentence. He submits that the old aged mother, two children and wife are dependent on the Appellant. Besides, the prosecutrix has recently married and is settled down in life. On this basis, it is submitted that the quantum of sentence awarded by the lower Court in respect of offence under Section 376 of the IPC be reduced. In my opinion, these are not matters which can persuade the Court to reduce the sentence than the minimum sentence provided by law as special or adequate reason. Hence, this argument is of no avail.

14. Accordingly, this Appeal partly succeeds.

The impugned Judgment and Order recording finding of guilt against the Appellant in respect of offence under Section 366-A of the IPC is set-aside. Whereas, the finding of guilt recorded against the Appellant for offence punishable under Section 363 and 376 of the IPC is upheld.

15. The Appellant shall suffer rigorous imprisonment for seven years and pay fine of Rs.2,500/- (Rupees Two Thousand Five Hundred), in default, to suffer rigorous imprisonment for further period of six months for offence punishable under Section 376 of the IPC and to suffer rigorous imprisonment for five years and to pay Rs.500/- (Rupees Five Hundred), in default, to suffer rigorous imprisonment for further three months for the offence punishable under Section 363 of the IPC. The substantive sentences shall run concurrently. The Appellant will be entitled for set-off. Muddemal be dealt with in terms of order of the Trial Court.

A.M.KHANWILKAR, J.